LOW MUN v. CHUNG KHIAW BANK LTD.

[S.C. (Wan Suleiman, Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) February 24 & June 13, 1987]

[Kuala Lumpur – Supreme Court Appeal No. 303 of 1986]

Bankruptcy – Notice – Whether bankruptcy notice for the amount of the debt as well as for an unspecified amount of interest and costs is a good notice upon which bankruptcy proceedings can be founded – Substituted service of bankruptcy notice – Order for substituted service – Bankruptcy Rules 1969, rr. 97, 110, 274 & Form 15 – Interpretation Act 1967, s. 62 – Bankruptcy Act 1967, ss. 3(1) & 131.

The appellant in this case was one of the guarantors in a loan transaction between a company and the respondent bank. Arising from the said guarantee the respondent bank obtained a final judgment in the principal sum of $2,325,000.00 together with interest and costs. Based on the judgment the bank issued a bankruptcy notice against the appellant which *inter alia* contained the following demand:

> "Take notice that within 7 days after service of this notice on you excluding the day of such service, you must pay to Chung Khiaw Bank Limited of Nos. 14-16, Jalan Dato Captain Ahmad, Kluang the sum of $2,325,000.00 together with interest thereon at the rate of 3% above the Judgment Creditors' base rate of interest per annum with monthly rests in respect of the sum of $2,100,000.00 and yearly rests in respect of the sum of $200,000.00 from the 27th day of February, 1983 until payment thereof and costs to be taxed claimed by them as being the amount due on final judgment obtained by them against you in Johore Bharu High Court Civil Suit No. 442 of 1984 dated the 21st day of January, 1985 whereon execution has not been stayed, ..."

The bankruptcy notice was served on the appellant by substituted service and subsequently adjudication and receiving orders were granted on the petition of the respondent bank. The appellant challenged not only the validity of the bankruptcy notice but also of the service of the notice on him. The main issue for determination is whether a bankruptcy notice for the sum of $2,325,000.00 and for unspecified amount of interest and costs is a good notice upon which bankruptcy proceedings may be founded under section 3(1)(i) of the Bankruptcy Act 1967.

Held: (1) the substituted service had sufficiently complied with Form 15 of the Bankruptcy Rules 1969 and since personal service could not be effected, it was not a wrong exercise of discretion for the court electing not to include in the order posting of the notice at the last known address of the debtor. Form 15 of the Bankruptcy Rules had been substantially complied with and whatever deviation from the prescribed form is covered by section 62 of the Interpretation Act 1967. The formal and typographical defects or irregularities, even if wholly proved, cannot invalidate the bankruptcy proceedings in this case;

(2) by demanding payment for unspecified sums in the bankruptcy notice, such demand is not in accordance with the terms of the judgment and applying the rule of strict construction the notice cannot be deemed to fall within section 3(1)(i) of the Bankruptcy Act. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven-day period. Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and failure to comply with such a notice is not an act of bankruptcy and a bankruptcy petition founded on it must necessarily fail;

(3) it cannot be disputed that the whole of the judgment for the repayment of the principal sum of the loan, interest and costs, on which the bankruptcy notice was founded, did not exist as a debt available for bankruptcy purposes at the time of the alleged act of bankruptcy and that being the case, the bankruptcy notice was a nullity *ab initio* and the appellant is entitled to succeed.

Cases referred to:

(1) *Teo Ah Bin* v. *Tan Kheng Guan* [1981] 2 M.L.J. 146.
(2) *In re Chinery* (1884) 12 Q.B.D. 342, 346.
(3) *Re Moore (a bankrupt)* (1969) 113 Sol. Jo. 791 C.A.
(4) *In re Woodall, Ex parte Woodall* (1884) 13 Q.B.D. 479.
(5) *Re a Debtor (No. 21 of 1937)* [1938] 2 All E.R. 824.
(6) *Re G.J., Ex parte G.J.* [1905] 2 K.B. 678, C.A.
(7) *Ex parte the Debtor* v. *Scott* [1954] 3 All E.R. 74.
(8) *Re A Debtor* v. *Slater Walker Ltd.* [1981] 2 All E.R. 987.
(9) *Re S.E. Menahem* [1952] M.L.J. 136.
(10) *In re H.B.* [1904] 1 K.B. 94.

SUPREME COURT.

S.I. Rajah for the appellant.
L.M. Ong for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the judgment of the court): On July 2, 1986, the appellant was adjudicated a bankrupt in the High Court at Johore Bahru. He is aggrieved by the decision to issue adjudication and receiving orders, and in the appeal before us, the appellant challenges not only the validity of the bankruptcy notice but also of the service of the notice on him. The main issue for determination is whether a bankruptcy notice for the sum of $2,325,000.00 and as well as for unspecified amount of interest and costs is a good notice upon which bankruptcy proceedings may be founded under section 3(1)(i) of the Bankruptcy Act 1967.

The appellant (hereinafter referred to as "the debtor") is one of the guarantors (*i.e.* sureties) in a loan transaction between Tuahbina Sdn. Berhad and the respondent bank (hereinafter referred to

as "the creditor"). Arising from the said guarantee the creditor on January 21, 1985 obtained a final judgment against the debtor *vide* Johore Bahru High Court Civil Suit No. 442 of 1984 in the principal sum of $2,325,000.00 together with interest and costs. Based on the said judgment the creditor issued a bankruptcy notice dated April 30, 1985 against the debtor which, *inter alia*, contained the following demand:

"Take notice that within 7 days after service of this notice on you excluding the day of such service, you must pay to Chung Khiaw Bank Limited of Nos. 14-16, Jalan Dato Captain Ahmad, Kluang the sum of $2,325,000.00 together with interest thereon at the rate of 3% above the Judgment Creditors' base rate of interest per annum with monthly rests in respect of the sum of $2,100,000.00 and yearly rests in respect of the sum of $200,000.00 from the 27th day of February, 1983 until payment thereof and costs to be taxed claimed by them as being the amount due on final judgment obtained by them against you in Johore Bharu High Court Civil Suit No. 442 of 1984 dated the 21st day of January, 1985 whereon execution has not been stayed ..."

The bankruptcy notice was served on the debtor by substituted service on December 2, 1985; adjudication and receiving orders were granted on July 2, 1986 on a creditor's petition dated January 6, 1986.

The first main argument in this appeal is based on the mode of substituted service and other alleged defects in the order for substituted service. The debtor was served with the bankruptcy notice by substituted service *vide* order of court dated September 3, 1985 after attempts to serve by personal service had failed. The service was to be by posting a copy of the notice together with a copy of substituted service on the notice board of the court, and by publication of the notice in a Chinese language daily newspaper with national circulation. There was no order for the posting of the notice at the front door of the debtor's last known address. Under rule 110 read with rule 97 of the Bankruptcy Rules 1969, the Bankruptcy Court has a wide discretion to order the manner in which the substituted service should be affected. Having considered the evidence, we are of the view that the substituted service had sufficiently complied with Form 15 of the Rules, and since personal service could not be effected, it was not a wrong exercise of discretion for the court electing not to include in the order, posting of the notice at the last known address of the debtor. The case of *Teo Ah Bin* v. *Tan Kheng Guan*[1] relied upon by the debtor has no application in this case. That authority concerns the power of the High Court to set aside an Order 14A judgment under the Rules of the Supreme Court 1957. The writ in that case was served by substituted service outside the jurisdiction and the Federal Court upheld the decision of the court below in setting aside the summary judgment on the ground that the judgment was for a larger sum than what the plaintiff had claimed in his writ of summons. That being the case, there was no real necessity for the court to consider whether substituted service by advertisement in a foreign press was proven to be wholly unlikely to come to the knowledge of the defendant. We are not persuaded that the order for the substituted service in the present case was defective. Form 15 of the Bankruptcy Rules had been substantially complied with and whatever deviation from the prescribed Form is covered by section 62 of the Interpretation Act 1967. We also agree with Mr. Ong, counsel for the creditor, that the technical irregularities either in the form of typing errors or otherwise in the service of the bankruptcy notice are curable under section 131 and rule 274 of the bankruptcy legislation. We are therefore of the view that such formal and typographical defects or irregularities, even if wholly proved, cannot invalidate the bankruptcy proceedings in this case.

We now move to the next argument which is based on a more substantial ground. The bankruptcy notice in this case neither specified the bank's base lending rate on which the interest payable should be calculated in accordance with the terms of the judgment, nor quantified the taxed costs. The reason for the omission was simply that at the time of issue of the notice, the base lending rate was not available and the costs of the proceedings had not been taxed. However, when the creditors' petition was subsequently filed, paragraph 2 thereof did specify "10.25% as the current base rate of interest, and the sum of "$9,880.50" as being the taxed costs claimed. It is submitted by Mr. Rajah on behalf of the debtor that as the demand in the bankruptcy notice was based upon the whole judgment obtained against the debtor, such bankruptcy notice was bad in law, for the reason that the claim included interest which had not been calculated in accordance with the creditor's base lending rate as required by the terms of the judgment. Such rate was not stated in the judgment and was subject to fluctuation and as such there was uncertainty in the judgment. It is further submitted that the bankruptcy notice, being founded upon a judgment which was bad for uncertainty, was itself bad in law as it was incapable of being complied with. Learned counsel cited the statement of Bowen L.J. in *In re Chinery*[2] which is quoted

in *Halsbury's Laws of England,* Volume 3 (4th Ed.) at pp. 161 and 162 under a paragraph dealing with non-compliance with bankruptcy notice which states:

"Where words are found in a section of an Act which is defining an act of bankruptcy they should be construed as strictly as if they occured in a section which was defining an offence, because the commission of the act of bankruptcy entails disabilities to the person who commits it."

To this submission, Mr. Ong for the creditor argues that by reproducing word for word the terms of the judgment in the bankruptcy notice, the creditor had complied with section 3(1)(i). According to him, if the debtor had wanted to comply with the bankruptcy notice, he could easily have inquired from the creditor the amount of interest payable since the final amount could only be determined on date of payment. Further, no attempt was made to set aside the bankruptcy notice. Mr. Ong elects not to reply directly to the debtor's argument on costs, but we assume his argument as to interest would also apply to costs *viz.* the creditor could have furnished the amount due if the debtor had asked for it. On Mr. Rajah's submission, we do not think that the judgment is bad in law for uncertainty, but the effect of the omission in the notice to quantify the amount of interest and costs due in accordance with the terms of the judgment is a relevant issue. In a bankruptcy proceeding, proof of an act of bankruptcy must be clear and convincing since no person should be made bankrupt on an ambiguity (see *Re Moore (a bankrupt)*[3]). As to the principle for construing bankruptcy notices, we agree with the view that since bankruptcy is entirely a creation of statute law, the rule of strict construction should be applied to the legislative words creating the act of bankruptcy.

Section 3(1)(i) Bankruptcy Act 1967, which is identical with section 1(1)(g) English Bankruptcy Act 1914, provides:

"A debtor commits an act of bankruptcy ... if a creditor has obtained a final judgment or final order against him for any amount, and execution thereon not having been stayed has served on him ... a bankruptcy notice under this Act requiring him *to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order,* ... and he does not within seven days [ten days in 1914 Act] after service of the notice ... either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand .... Provided that for the purpose of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order."
(emphasis supplied)

It is also essential that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution – see *In re Woodall, ex parte Woodall.*[4] If part of the debt has been paid or unenforceable in bankruptcy, the notice can only be issued for the balance – see *Re A Debtor.*[5] Thus, a bankruptcy notice can only be issued for the judgment debt or that part of the debt on which the creditor can issue execution. In the present case, as at the date of issue of the bankruptcy notice, only in respect of that part of the judgment debt of $2,325,000.00 the creditor could have issued execution. The remaining parts of the judgment debt on the interest on the loan and the costs of proceedings had not been quantified in accordance with the terms of the judgment, and hence these parts of the judgment debt were then incapable of being the subject of execution. In our view, the demand for payment of interest and costs was wrongly included in the bankruptcy notice because it was only after the issue of the notice *i.e.* when the creditor's petition was issued on January 6, 1986 that the creditor was able to ascertain the base lending rate of "10.25%" per annum, and also to quantify the costs at $9,880.50 after taxation. Clearly, the bankruptcy notice was bad in law as it contained demand for payment of the whole judgment debt within seven days when parts of the whole debt had not been or could not be quantified, and as such were incapable of being made the subject of execution, and consequently incapable of being complied with. Non-compliance with the demand to pay such unascertained sums cannot constitute an act of bankruptcy. The demand for payment in the notice must not only be quantified but must also be the correct sum owing as at the date of the notice. In the circumstances, the bankruptcy notice should have made it clear that the demand for payment was limited only to the principal sum of $2.325 million, or both the interest and the costs should have been left out altogether and when their amounts had been ascertained, they could, before adjudication, be made the subject of a separate bankruptcy notice. Alternatively, both the interest and the costs should be quantified first before notice was issued on the whole judgment debt. In any event, any balance of a judgment debt, including interest and costs not demanded in the notice, could subsequently be proved in bankruptcy to the Official Assignee under Part III of the Bankruptcy Act.

As regards costs, where a judgment is obtained for a certain sum and costs to be taxed, a bankruptcy notice can be issued for the amount of the judgment without the costs – see *Re G.J., ex parte G.J.*[6] The costs cannot be included or separately relied on until they have been taxed – *Ex Parte The Debtor* v. *Scott.*[7] It should be observed that once the seven days have expired without the debtor having satisfied the debt or having satisfied the court that he has a valid counterclaim, an act of bankruptcy occurs by operation of law, and the court has no jurisdiction under section 93(4) to extend the period prescribed (see *Re A Debtor* v. *Slater Walker Ltd.*[8]). In this country, the courts have for a long time recognised that a judgment for costs only would support a bankruptcy petition – see judgment of Sir Charles Murray-Aynsley C.J. in *Re S.E. Menahem.*[9]

Learned counsel for the debtor relied heavily on the judgment of Sir Wilfred Greene M.R. in *Re A Debtor (No. 21 of 1937)*[5] for the proposition that inclusion of the untaxed costs in this case renders the whole of the bankruptcy notice bad in law. In that case, the Court of Appeal held that the issue of the bankruptcy notice for the sum of 78 pounds 18 shillings 6 pence founded on a judgment debt for that amount was a step in the enforcement of the judgment in bankruptcy, and the judgment being one which by virtue of the inclusion in it of a debt incurred before August 2, 1935 (the date of the coming into operation of the Law Reform (Married Women and Tortfeasors) Act 1935) could not be enforced in bankruptcy, the bankruptcy notice was a nullity *ab initio* and no petition could be founded upon it. Since the said judgment was indivisible, a bankruptcy notice in respect of a judgment debt which was in part unenforceable was held invalid and could not be saved by calling in aid the principles whereby the court might scale down the amount of the debt on the hearing of the petition (see *Halsbury's Laws of England,* Vol. 3 (4th Ed.) at p. 167 paragraph 264). In the present case the facts are even worse, because even if the judgment for the principal loan, interest and costs is divisible, the bankruptcy notice being founded on the whole judgment under section 3(1)(i) was not "in accordance with the terms of the judgment", for apart from the principal loan of $2,325,000.00 there was non-compliance with the terms of the judgment as regards interest and costs. The interest claimed ought to have been quantified as at the date of issue of notice, *i.e.* "at the rate of 3% above the base rate of interest per annum" (which we now know to be at 10.25%) "with monthly rests in respect of the sum of $2,100,000.00 and yearly rests in respect of the sum of $200,000.00 from the 27th day of February 1983." Similarly, the costs should have been "taxed as between party and party" before the date of issue of notice (which we now know to be $9,880.50). Instead, the creditor merely reproduced the terms of the judgment on the interest and costs in the bankruptcy notice without quantifying the amounts claimed to be due. The Bankruptcy Act provides expressly that the notice must be to pay the judgment debt "in accordance with the terms of the judgment". Thus *In re H.B.*[10], a bankruptcy notice was held to be bad if founded not according to its terms but on some agreement which modified the terms of the judgment, and therefore not in accordance with the terms of the judgment. Consequently, we are of the view that when you have the judgment in the usual form that we have here, a bankruptcy notice under the Act must require payment of quantified sum or sums alleged to be due according to the terms of the judgment as at the date of issue of bankruptcy notice. The duty is on the creditor to state the correct amount due, and there is no obligation imposed on the debtor to make inquiries if the amount demanded is ambiguous or unascertained. By demanding payment for unspecified sums in the bankruptcy notice, we hold that such demand is not in accordance with the terms of the judgment, and applying the rule of strict construction, the notice cannot be deemed to fall within section 3(1)(i) of the Bankruptcy Act. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven-day period. Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and that failure to comply with such notice is not an act of bankruptcy, and a bankruptcy petition founded on it must necessarily fail. As stated by Sir Raymond Evershed in *Ex Parte The Debtor* v. *Scott*[7] at p. 78:

> "At each stage of these (bankruptcy) proceedings, you should take the facts as you found them." (Page 78A)

> "I think there is a further requirement which emerges from what has been called the common law of bankruptcy, *i.e.* the rules or principles which the courts have held to be applicable in bankruptcy proceedings, though in terms this requirement does not appear to be expressly stated in the statute. The requirement, in my judgment, is that the petitioning creditor's debt must also be shown to have existed and to have the necessary character and quality stated in s.4 at the date of the act of bankruptcy as well

as at the dates of the presentation and hearing of the petition." (Page 78H)

Applying these statements to the present case, the current base lending rate of "10.25%" and the taxed costs of "$9,880.50" in the creditor's petition cannot be read into the bankruptcy notice. Thus, on the date of issue of bankruptcy notice, it could not be said of the judgment on the interest and the costs that they constituted a judgment debt presently payable to the creditor, for they had not been quantified into a liquidated sum. It cannot be disputed that the whole of the judgment for the repayment of the principal sum of the loan, interest and costs, on which the bankruptcy notice was founded, did not exist as a debt available for bankruptcy purposes at the time of the alleged act of bankruptcy, and that being the case the bankruptcy notice was a nullity *ab initio*, and the debtor is entitled to succeed.

For the above reasons we allow the appeal with costs and set aside the adjudication and receiving orders. We also order the deposit to be refunded to the appellant.

Appeal allowed.

Solicitors *S.I. Rajah & Partners; L.M. Ong & Co.*

PHANG YONG FOOK v. PUBLIC PROSECUTOR

[A.Cr.J. (Zakaria Yatim J.) September 30, 1987]

[Kuala Lumpur – Criminal Appeal No. CR 52-24 of 1987]

Criminal Procedure – Bail – Charge of criminal breach of trust – Accused released on bail pending trial – Application for bail to be revoked – Allegation that accused had been harassing and tampering with witnesses – No evidence adduced – Bail revoked – Criminal Procedure Code (F.M.S. Cap. 6), ss. 388 & 389.

In this case, the applicant had been charged in the Sessions Court with abetting the offence of criminal breach of trust and also for committing the offence itself. He was released on bail in the sum of $1 million in four sureties pending his trial. At the commencement of the trial, the prosecution sought for an order to revoke the bail. It was alleged that the applicant had been harassing and tampering with witnesses. After hearing the learned Deputy Public Prosecutor and counsel for the applicant, the learned Sessions Judge made an order revoking the applicant's bail. The applicant applied to the High Court for an order that he be admitted to bail.

Held: (1) the considerations for cancellation of bail are different from those for granting bail. Power to take back accused has to be exercised with care and circumspection in appropriate cases, when by a preponderance of probabilities, it is clear that the accused is interfering with the cause of justice by tampering with witnesses;

(2) even when evidence is adduced in support of an application to cancel the bail granted to an accused person, the court should not allow the application without giving the accused person an opportunity to be heard first;

(3) in this case, the learned Deputy Public Prosecutor only made vague allegations of harassment, tampering with witnesses and intimidation in support of his application to revoke the bail in the court below. There was no oral or documentary evidence or even an affidavit to support the allegations;

(4) the revocation order must therefore be set aside and the applicant be released on bail on the terms of the bail bond executed by him and his sureties.

Cases referred to:

(1) *Public Prosecutor* v. *Wee Swee Siang* [1948] M.L.J. 114.

(2) *Sant Ram & Ors.* v. *State* [1952] Cr.L.J. 1223; A.I.R. 1958 Jammur Kashmir 28.

(3) *Maibam Bidhu Singh & Ors.* v. *Manipur Administration* [1959] Cr. L.J. 1453; A.I.R. 1959 Manipur 47.

(4) *Madhukar Purshothan Mondkar & Anor.* v. *Talab Haji Hussain & Ors.* A.I.R. 1958 Bombay 406.

(5) *R.K. Nabenchandra Singh* v. *Manipur Administration* [1964] 2 Cr.L.J. 307; A.I.R. 1964 Manipur 307.

(6) *The State* v. *Sanjay Gandhi* A.I.R. 1978 S.C. 961.

CRIMINAL APPLICATION.

Low Hop Bing (*Tong Teck Yong* with him) for the appellant.

P.L. Tan (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an application by the accused in Kuala Lumpur Sessions Court Arrest Case Nos. 69/87 and 70/87 for an order that he be admitted to bail under section 389 of the Criminal Procedure Code.

On May 4, 1987 the applicant was charged in the Sessions Court for abetting the commission of an offence of criminal breach of trust in A/C No. 69/87 and for committing criminal breach of trust in A/C No. 70/87. On the same day, the learned Sessions judge allowed him to be released on a bail of $1 million in four sureties. The bail was duly executed and the applicant was released pending his trial, which was fixed on September 21, 1987.